

CWA § 404 (g): State and Tribal Dredged and Fill Permit Programs

2018 Region 7 ESTP Wetland Symposium

Speakers: Kathy Hurd and HQ 404(g) team

USEPA Office of Wetlands, Oceans and Watersheds

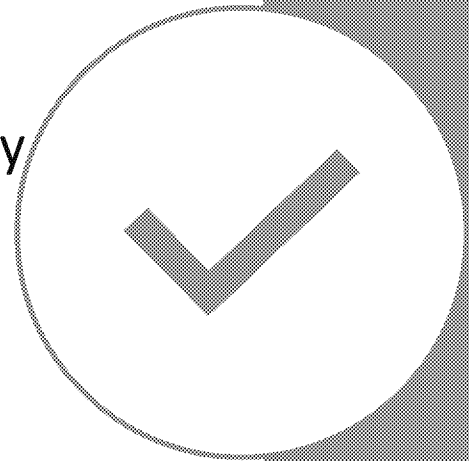
November 6, 2018

Why Are We Here?

- EPA is encouraging States and tribes to assume the Clean Water Act Section 404 Program (CWA §404(g))
 - Acting Administrator Wheeler letter – September 20, 2018
- Provide information on CWA §404(g)
 - What is assumption?
- EPA is updating the CWA §404(g) regulations
 - Seeking input on how regulations could be updated and modernized to increase interest in CWA §40(g)
 - Spring Regulatory Agenda – Final Rule 2020/21

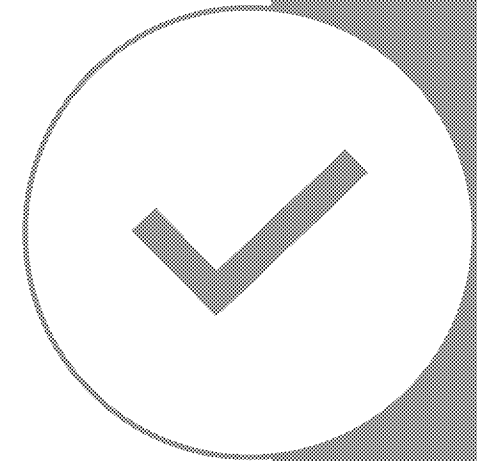
What Is §404(g) Program Assumption?

- **CWA §404 requires a permit be issued before dredged or fill material can be discharged into waters of the US**
- CWA § 404(g) enables tribes and states to assume administration of the dredge and fill permitting program for certain waters
 - Michigan (1984) & New Jersey (1994) have assumed this authority
 - Army Corps of Engineers (Corps) issues permits for all other jurisdictional waters
 - EPA oversees assumed programs
- CWA §404(g) and 40 CFR Part 233 describe:
 - State and tribal program requirements
 - EPA responsibilities: approval and oversight of assumed program
 - Requirements for review, modification, and withdrawal of assumed program (as necessary)



Why Assume the § 404 Program?

- Why assume? States and tribes have said:
 - Streamline permitting – reduce permitting timeframes and ability to coordinate with other tribal and state water and land use programs
 - Eliminate unnecessary duplication
 - Knowledge of and closer to the water resources
 - Consistency with other CWA programs implemented by tribes and states
- What barriers have states and tribes identified?
 - Lack of dedicated funding
 - Lack of clarity on assumption process and requirements including which waters are assumable



What Are the Assumption Requirements?

- A tribal or state assumed program must be consistent with and no less stringent than the CWA and regulations.
- Assumed **program must include**, but is not limited to:
 - Permitting procedures;
 - Administrative and judicial review procedures;
 - Regulating discharges into all assumed waters within the tribe or state's jurisdiction;
 - Regulation of at least the same scope of activities as the §404 program;
 - Provisions for public participation;
 - Meeting public notice requirements;
 - Permit issuance consistent with the environmental review criteria known as the CWA §404 (b)(1) Guidelines;
 - Compliance and enforcement authorities as specified in the regulations; and
 - Coordination procedures with federal agencies, adjacent states and tribes.

What is EPA's Role in Assumption?

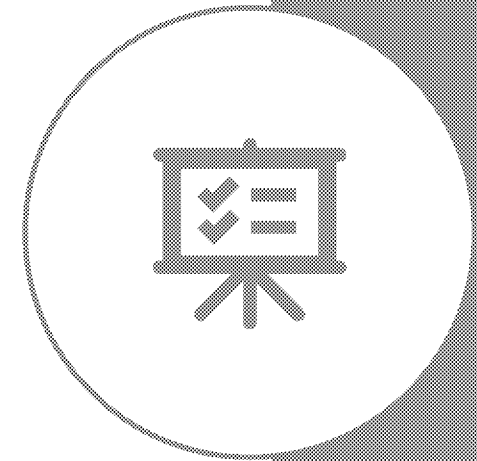
- **Prior to assumption**
 - Work with tribes and states to enhance capacity/capability and develop programs – ESTP, technical assistance
 - Wetland Program Development Grants can fund capacity building
- **Evaluate and approve/disapprove assumption request**
 - Includes tribal consultation if appropriate
- **Oversight of assumed program**
 - Review and comment on permits – not waived
 - Review of modifications of assumed program
 - Withdraw program approval, if needed

What is the State's or Tribe's Role in Assumed Program?

- Tribe or state transmits to EPA notice of every permit application received
- EPA reviews permits where EPA review is not waived
 - Review and comment
 - EPA seeks comments from other agencies
- State or tribe shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed

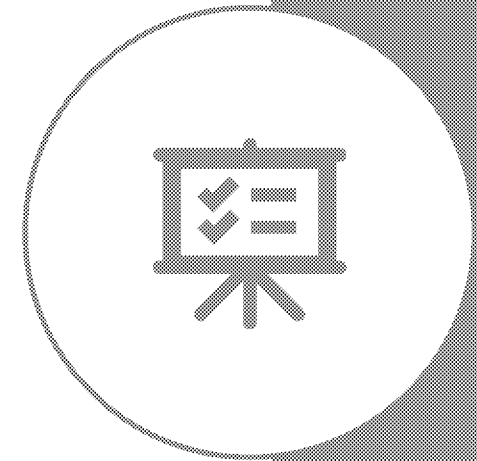
Revising the CWA §404(g) Regulations

- First comprehensive revision to the existing CWA §404(g) regulations since 1988
- EPA is seeking early input from our co-regulators on potential changes
- Pre-Proposal engagement:
 - Tribal consultation and coordination
 - Comment period October 22 - December 21, 2018
 - Presentation to National Congress of American Indians - October 24, 2018, Denver, CO; tribal webinars November 20 and 29, 2018
 - State input
 - Comment period November 12, 2018 – January 11, 2019
 - Meeting December 5, 2018, Washington, DC



Submitting Comments on §404(g) Regulation Revision

- **How to submit comments:**
 - Comments can be submitted to 404g-rulemaking@epa.gov
- **How to submit public comments:**
 - EPA will open a public comment period when the Agency publishes in the Federal Register any proposed revisions to the §404(g) regulations
 - We anticipate this being early calendar year 2020



For More Information

Headquarters

General 404(g) questions:

Kathy Hurd – (202) 566-1269

Tribal 404(g) consultation questions:

Lauren Kasparek – (202) 564-1896

Region 7

Glenn Curtis

Email: curtis.glenn@epa.gov

Phone: (913) 551-7726

EPA 404 assumption website: <https://www.epa.gov/cwa404g>

Email and pre-rule comments: 404g-rulemaking@epa.gov

Thank You!



Examples of Issues for Input

Issue #1: Clarifying Assumable Waters

Background:

- States and tribes can assume administration of the CWA §404 program only in certain waters. The Corps retains permitting authority for:
 - Tidal waters and their adjacent wetlands
 - Waters used as a means to transport interstate or foreign commerce and their adjacent wetlands
- Retained waters further clarified in recent US Army memo:
 - August 7, 2018, memo describes which waters are to be retained by Corps when state or tribe assumes waters
 - Based upon 2017 recommendations from EPA federal advisory committee on assumable waters (<https://www.epa.gov/cwa-404/assumable-waters-sub-committee>)

Issue #1: Identification of “Retained” & “Assumed” Waters

- The scope of assumable and retained waters:
 - Should the EPA codify the Subcommittee majority’s recommendation that the Corps retain section 10 waters of the Rivers and Harbors Act?
 - If yes, how should post-assumption changes to the Corps’ section 10 list be treated? What process should be used?
- Which adjacent wetlands should be retained:
 - EPA appreciates any information that might support the Subcommittee majority’s “default” 300 foot administrative line - Corps retains wetlands waterward of the line.
 - Should a different “default” value be considered?
 - Should there be no default distance in light of differing wetlands characteristics among different eco-regions?
- Who (tribe/state or Corps) should have administrative permitting authority over discharges that extend across the administrative line?

Issue #2: Partial Assumption

- Would states and tribes be more likely to assume the program if partial assumption were allowed?
- How might partial assumption, if permissible, work in a manner that is easily understood by the regulated community and practical in its application?
- How would a partial assumption program differ from State Programmatic General Permits (SPGP)? Do these SPGPs offer the flexibility being sought under a partial assumption framework?

Issue #3: Consistent With and No Less Stringent Than

Background: CWA requires assumed programs to issue permits consistent with the CWA §404(b)(1) Guidelines (40 CFR Part 230) which are no less stringent than federal permits (33 U.S.C. § 1370)

- How should tribes and states address aspects of the §404(b)(1) guidelines that refer to other federal laws? e.g., National Historic Preservation Act
- How tribes and states could ensure their §404 permits do not adversely affect threatened and endangered species since this is not a federal action?

Other Potential Issues Under Consideration

- **Process for Identifying assumable and retained waters**
 - The Subcommittee laid out a process for the how the state or tribe, the Corps, and the EPA would work together during assumption.
 - Are the ways to improve this suggested process or tailor it for the individual needs of tribes?
- **What practices** should be followed when it becomes necessary for the tribe or state to issue a permit to itself? e.g., a highway project
- **Mitigation**, there are many considerations including:
 - Should establishment and composition of interagency review teams (IRTs) differ in under assumed programs? If so, how?
 - How might existing mitigation banks containing assumed waters continue operation following assumption?